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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 MATTHEW STRONG,

13 Plaintiff,

14 vs.

15 WALGREEN CO., doing business as
16 Walgreens; and RUDOLPH BRAGG,
Trustee of the Bragg Family Trust,
Dated April 22, 1982,

17 Defendants.

CASE NO. 09cv611 WQH
(WVG)

ORDER

18 HAYES, Judge:

19 The matter before the Court is the Motion for Attorney's Fees, Litigation
20 Expenses, Expert Costs, and Sanctions Against Plaintiff's Counsel filed by Defendants
21 Walgreen Co. ("Walgreens") and Rudolph Bragg, Trustee of the Bragg Family Trust,
22 dated April 22, 1982 (ECF No. 132).

23 **BACKGROUND**

24 On October 10, 2013, this Court filed an Order concluding that Defendants are
25 "not precluded from recovering attorney's fees incurred defending against the 10 non-
26 parallel barriers alleged in Plaintiff's claim under the California Disabled Persons Act
27 ("CDPA"), Cal. Civ. Code § 55, after November 8, 2011 when the Court issued its
28 Order on the parties' motions for summary judgment, because there were no parallel

1 federal claims.” (ECF No. 145 at 8). The October 10, 2013 Order further stated that
 2 “Defendants had failed to produce evidence demonstrating the number of hours billed
 3 after summary judgment that were expended specifically in defending against the 10
 4 non-parallel barriers.” *Id.* The Court granted Defendant leave to submit supplemental
 5 materials. *Id.*

6 On October 22, 2013, Defendants submitted an affidavit in support of their
 7 Motion for Attorney’s Fees, Litigation Expenses, Expert Costs, and Sanctions Against
 8 Plaintiff’s Counsel. (ECF No. 146). The affidavit detailed Defendants’ activities after
 9 summary judgment, and established that Defendants spent approximately 84 hours
 10 defending against the 10 non-parallel state law barrier claims. The affidavit showed
 11 that \$23,058.75 was the amount incurred by Defendants to address the 10 non-parallel
 12 state law claims. *Id.* at 4.

13 In response, Plaintiff filed no objection to the amount of fees incurred by
 14 Defendants. Plaintiff contends that Defendant may not recover any fees on the grounds
 15 that Plaintiff’s 10 non-parallel state law claims were brought under both section 55
 16 (CDPA) and section 52 (Unruh Civil Rights Act). (ECF No. 64 ¶¶ 33 - 47). Plaintiff
 17 relies on *Turner et al. v. Association of American Medical Colleges*, 193 Cal. App. 4th
 18 1047. On December 16, 2013, Defendants filed a reply. (ECF No. 149). Defendants
 19 assert that *Turner* is not good law after the California Supreme Court’s opinion in
 20 *Jankey v. Song Koo Lee*, 55 Cal. 4th 1038.

21 **RULING OF THE COURT**

22 In this case, Plaintiff’s 10 non-parallel state law claims were brought under both
 23 California Civil Code section 55 (CDPA) and section 52 (Unruh Civil Rights Act).
 24 Section 55 provides that the “prevailing party” in an action for injunctive relief under
 25 the CDPA “shall be entitled to recover reasonable attorney’s fees.” Cal. Civ. Code §
 26 55. Section 52 authorizes fee awards only to prevailing plaintiffs. Cal. Civ. Code § 52.

27 In *Turner*, applicants to take a standardized test, who had reading-related learning
 28 disabilities and/or attention deficit hyperactivity disorder (ADHD), brought a class

1 action against the test administrator for violations of the Unruh Civil Rights Act and the
2 CDPA. *Turner*, 193 Cal. App. 4th at 1053. The Superior Court of Alameda County
3 entered judgment for plaintiffs after a bench trial. *Id.* The California Court of Appeal
4 of the First District reversed the trial court's decision, and on remand defendant sought
5 an award of attorney's fees under section 55. *Id.* As an issue of first impression, the
6 Court of Appeal considered whether "a trial court [is] required to award attorney's fees
7 to a prevailing defendant under the bilateral, 'prevailing party' statutory fee shifting
8 provision in section 55 for attorney hours that were inextricably intertwined with the
9 hours incurred in defending claims under sections 52 and 54.3[.]" *Id.* at 1054. The court
10 stated: "The statutory conflict is clear: [s]ection 55 on its face would permit a defendant
11 to recover fees for attorney hours spent defending claims under the Unruh Act and
12 section 54.3, but sections 52 and 54.3 reflect the Legislature's intent that prevailing
13 defendants *not* receive a fee award for such attorney hours." *Id.* at 1064. Based upon
14 an analysis of public policy considerations, the court concluded that:

15 ... a prevailing defendant is not entitled to an attorney fee award for such
16 hours. When the legislature enacted the unilateral, 'prevailing plaintiff'
17 fee-shifting provisions in sections 52 and 54.3, it created an exception by
implication, prohibiting a fee award to a prevailing defendant for the same
hours devoted to defending claims under sections 52 and 54.3.

18 *Id.* The court held that "where a defendant prevails against a plaintiff who sought relief
19 under section 55 as well as section 52 and/or section 54.3, the defendant may not obtain
20 an attorney fee award under section 55 for attorney hours inextricably intertwined with
21 hours spent defending claims under section 52 and/or section 54.3." *Id.* at 1073.

22 In *Jankey*, a patron brought an action against a store owner, seeking injunctive
23 relief under the Americans with Disabilities Act ("ADA"), the Unruh Act, and the
24 CDPA. 55 Cal. 4th at 1042. Defendant prevailed and sought attorneys' fees. *Id.* The
25 trial court concluded that fees for a prevailing defendant were mandatory under section
26 55, and the Court of Appeal affirmed. *Id.* The California Supreme Court considered
27 "whether an award of mandatory fees is preempted by the [ADA]." *Id.* Section 55
28 mandates a fee award to a prevailing party, while the ADA allows defendants fees only

1 for responding to frivolous claims and makes fee recovery discretionary. *Id.* at 1045,
 2 1047. The court ultimately concluded that “the plain language of section 55 makes an
 3 award of fees to any prevailing party mandatory, and the ADA does not preempt this
 4 part of the state’s attorney fee scheme” *Id.* Plaintiff also argued that “section 55
 5 does not authorize fees for work overlapping with Unruh Civil Rights Act and section
 6 54.3 defense.” *Id.* at 1056 n. 16. The court responded that “Jankey did not raise the
 7 issue in the trial court, the Court of Appeal, or the petition for review. Because the
 8 issue is thus waived, we do not consider it.” *Id.*

9 “Decisions of the California Courts of Appeal are to be followed by a federal
 10 court where the Supreme Court of California has not spoken on the question, in the
 11 absence of convincing evidence that the highest court of the state would decide
 12 differently.” *Hubbard v. Sobreck, LLC*, 554 F.3d 742, 745 (9th Cir. 2009) (quoting
 13 *Klingebiel v. Lockheed Aircraft Corp.*, 494 F.2d 345, 346 n. 2 (9th Cir. 1974)). This
 14 Court concludes that the ruling in *Jankey* that state law is not preempted by federal law
 15 is not convincing evidence that the California Supreme Court would decide the conflict
 16 in state law differently from the Court of Appeals in *Turner*. In the absence of
 17 convincing evidence that the California Supreme Court would decide differently, the
 18 Court must follow the California Court of Appeal’s holding in *Turner*. In this case, the
 19 fees associated with Plaintiff’s section 55 claim are “inextricably intertwined” with the
 20 fees associated with Plaintiff’s section 52 claim, and no attorneys’ fees may be awarded.
 21 *Turner*, 193 Cal. App. 4th at 1059. Accordingly, Defendant is not entitled to attorneys’
 22 fees.

23 IT IS HEREBY ORDERED that the Motion for Attorney’s Fees, Litigation
 24 Expenses, Expert Costs, and Sanctions Against Plaintiff’s Counsel is DENIED. (ECF
 25 No. 132).

26 DATED: January 17, 2014

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 28 **WILLIAM Q. HAYES**
 United States District Judge